

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY  
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JAN -7 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0175-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
TOMMIE LEVIE POWERS,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-48734

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

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Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Tommie Levie Powers

Florence  
In Propria Persona

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B R A M M E R, Judge.

¶1 Petitioner Tommie Powers seeks review of the trial court’s summary dismissal of his successive post-conviction relief proceeding. In 1995, Powers pled guilty to one count of sexual conduct with a minor under the age of fourteen and was sentenced to an aggravated prison term of twenty-five years. Powers filed his first petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in September 1996. The trial court summarily dismissed that petition and on review, we denied relief, finding the trial court had not abused its discretion. *State v. Powers*, No. 2 CA-CR 96-0666-PR (memorandum decision filed Sept. 9, 1997).

¶2 Powers filed a successive petition for post-conviction relief in August 2008. The trial court apparently construed the petition as a notice of post-conviction relief and appointed counsel to represent Powers. In January 2009, citing *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995), counsel avowed he had found “no tenable issue for review and cannot proceed.”

¶3 After receiving counsel’s notice, the trial court afforded Powers sixty days in which to file a pro se petition for post-conviction relief. In response, Powers filed another petition on February 23, 2009, before the deadline set by the court. In both of the petitions Powers filed below, he appears to contend newly discovered evidence entitles him to raise claims of sentencing error that would ordinarily be precluded in a successive petition. *See* Ariz. R. Crim. P. 32.1(e) (grounds for Rule 32 relief include “[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence”);

32.2(a) (precluding claims finally adjudicated on the merits or waived on appeal or in any previous collateral proceeding); 32.2(b) (preclusive effect of Rule 32.2(a) “shall not apply to claims for relief” based, inter alia, on Rule 32.1(e)).

¶4 The state did not file a response to Powers’s petition. *See* Ariz. R. Crim. P. 32.6(a) (“state shall file . . . a response” within forty-five days after petition is filed). In May 2009, the trial court dismissed Powers’s Rule 32 petition on the apparently mistaken ground he had failed to file a supplemental pro se petition before March 30, 2009, the deadline the court had set. In his petition for review, Powers reasserts the claims he had raised below and maintains the trial court “rendered a decision that was incorrect, by law.”<sup>1</sup>

¶5 We will not disturb a trial court’s ruling on a petition for post-conviction relief absent an abuse of the court’s discretion. *See State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). In this case, the trial court appears to have mistakenly believed Powers had failed to file a supplemental petition in compliance with the court’s order and, based on that mistake, dismissed Powers’s proceeding without “reviewing the petition, response, reply, files and records,” as required by Rule 32.6(c).

¶6 The trial court was not required, under Rule 32.4(c)(2), to appoint counsel to represent Powers in this successive Rule 32 proceeding in a non-capital case. Nor was counsel required to “investigate [Powers’s] case for any and all colorable claims.” *See id.*

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<sup>1</sup>Although Powers has styled his petition as one for “special action” relief, we regard it as a petition for review pursuant to Rule 32.9(c), Ariz. R. Crim. P.

But what is unclear is whether, having appointed counsel in a successive post-conviction proceeding, the court may permit a defendant to file a pro se petition when appointed counsel declines to proceed in his behalf. Regardless whether the court properly permitted Powers to file a pro se petition,<sup>2</sup> having done so the court should have considered what Powers filed. It appears the trial court did not consider the petitions Powers filed because it mistakenly believed he had failed to file them. We will not address these claims in the first instance because it is the trial court that first must decide, in the exercise of its discretion, whether to grant post-conviction relief. *See* Ariz. R. Crim. P. 32.9(c) (petition for review limited to “issues which were decided by the trial court”).

¶7 We grant Powers’s petition for review. We remand this matter to the trial court, which is directed to consider the claims Powers had raised in the pro se petitions.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge

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<sup>2</sup>An opportunity for supplemental briefing seems particularly appropriate here, where Powers had not requested representation by counsel.

